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December 9, 2002

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Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

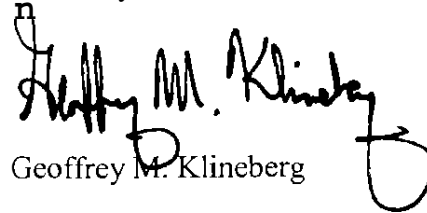
Rc: *Application by SBC Communications Inc., et al. for Provision of In-Region,
InterLATA Services in California, WC Docket No. 02-306*

Dear Ms. Dortch:

On behalf of SBC Communications Inc. ("SBC"), I am attaching a letter that **was** hand-delivered to Commissioner Martin's office today. In accordance with this Commission's rules governing ex parte communications, SBC is filing two copies of this letter and attachment. Please file stamp and return the additional copy.

Thank you for your kind assistance in this matter.

Sincerely,


Geoffrey M. Klineberg

Attachment

cc: Christopher Libertelli
Matthew A. Brill
Emily A. Willeford
John P. Stanley
Renee R. Crittendon

Tracey Wilson
Lauren J. Fishbein
Brianna Kucerik
Phyllis White
Qualex International

File of Order 02-306
List A-B-C-D-E



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December 9, 2002

Via Hand Delivery

Commissioner Kevin Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Application by SBC Communications Inc., et al. for Provision of In-Region,
InterLATA Services in California, WC Docket No. 02-306*

Dear Commissioner Martin:

On behalf of SBC Communications Inc. ("SBC"), I am writing to thank you for meeting with us on Friday, December 6, and for taking the time to discuss some of the issues presented by the application for section 271 relief in California. As you requested, I am following up on a few of those issues with a more detailed response:

The Interim Rate for DS3 Loops

As we explained in our opening brief (at 33), the California PUC established a TELRIC-based DS3 loop price in 1999. See Scholl Aff. ¶ 113 (App. A, Tab 19); Scholl Reply Aff. ¶ 33 (Reply App., Tab 13); Vandeloop Aff. ¶ 51 (App. A, Tab 23). **At** the time of the application, Pacific knew that the California PUC was in the process of re-examining the rates for DS3 loops in the 2001/2002 Relook proceeding and that it was likely that new rates would be established for the DS3 loop at the conclusion of that proceeding. So, in order to eliminate the concern about the current rate for the DS3 loop that had been raised in the state proceeding, Pacific committed to treat that rate – which was \$1837.18 – as interim from the date of the filing, subject to true-up to the final rate set by the California PUC in the Relook Process.

This Commission has approved applications based on interim rates in the past under circumstances similar to the one presented here. For example, in Missouri, Southwestern Bell Telephone Company ("SWBT") had in place throughout the pendency of its section 271 application an interim rate for DS3 entrance facilities of \$1884.49. See Joint Application for Arkansas and Missouri, CC Docket No. 01-194 (**App. B - MO**, Tab 1, **App. 6**, Schedule of Prices). This rate, like the rate in the California application, was subject to retroactive true-up to prices established in a then-pending Missouri PSC proceeding. In rejecting a challenge to the interim rates in Missouri at the time of that application, this Commission reiterated its test:

[I]nterim rates may be acceptable as part of a section 271 application if: 1) the interim solution to a particular rate dispute is reasonable under the circumstances; 2) the state commission has demonstrated its commitment to our pricing rules; and 3) provision is made for refunds or true-ups once permanent rates are set. SWBT passes the test. The Missouri Commission has demonstrated its commitment to TELEUC. All of SWBT's interim rates are subject to refund or true-up once the permanent rates are set. The Missouri Commission has scheduled hearings for [the following month] to conclude the setting of permanent rates in Missouri. We find the interim rates in question [which included the \$1884.49 rate for DS3 entrance facilities] are reasonable under the circumstances.

Arkansas/Missouri Order ¶ 64 (footnotes omitted).

The case for accepting the interim California rate is even stronger. Pacific's DS3 loop rate of \$1837.18 was established as the permanent, TELRIC based rate by the California PUC, and no one has presented any empirical evidence to the contrary in this record. As discussed above, Pacific voluntarily agreed to treat this rate as interim subject to true-up. On the other hand, SWBT's nearly identical Missouri DS3 entrance facility rate of \$1884.49 was simply the rate that SWBT had proposed and that the Missouri PSC had accepted as interim. Nevertheless, this Commission concluded that, as an interim rate subject to true-up to prices that were to be set in a pending proceeding, the \$1884.49 **rate** for DS3 entrance facilities in Missouri satisfied the checklist requirement

As we explained during our meeting (and for the reasons summarized above), Pacific's section 271 application "relies" on the \$1837.18 interim rate that was in effect on September 20, 2002. However, one month after the application was filed, Pacific submitted new cost studies for DS3 loops in the Relook proceeding. Although Pacific certainly had no obligation to reduce its rates in light of those new cost studies,¹ Pacific chose to do so in a further effort to respond to CLEC concerns. As Pacific explained in its reply brief (at 26), it offered to provide DS3 loops at a rate of \$573.20, on an interim basis, subject to true up when the final rate is established in the Relook proceeding (or until such time as Pacific is no longer required to make the DS3 loop available as an unbundled network element). See also Vandeloop Reply Aff. ¶ 16 n.44. (Reply App., Tab 17). One CLEC – DSLNet, Inc. – has signed this amendment, and, pursuant to California PUC procedures, the amendment will become effective on December 14, 2002.²

¹ "[T]he Commission has repeatedly held that the existence of a new cost proceeding is insufficient reason to find that a state's existing rates do not satisfy TELRIC principles. We decide the merits of [the BOC's] 271 application based on its present rates, and it would be arbitrary and inappropriate for the Commission to consider other rates here that have been proposed in another proceeding, especially just because rates are lower." Georgia/Louisiana Order ¶ 97 (footnote omitted).

² In response to further concerns expressed by XO California, Inc. ("XO"), Pacific has proposed – and XO has accepted – a new amendment that makes the \$573.20 interim rate effective December 6, 2002, and incorporates the change-of-law provision that is already

The Role of the State Commission

As we discussed, the California PUC concluded in its Final Decision that Pacific had to implement a mechanized Number Portability Administration Center (“NPAC”) verification check before the state commission could “find and/or verify that Pacific has satisfied the compliance requirements for Checklist Item 11.” CPUC Final Decision at 200. Although Pacific has now implemented the requested mechanized NPAC check and provided data to the CPUC demonstrating the success of that implementation, see Reply Brief at 64-65; E. Smith Reply Aff. ¶¶ 8-9 & Attach. A (Reply App., Tab 15), the California PUC has not yet “verified” or “found” that Pacific has satisfied this checklist item.

This Commission has repeatedly recognized, beginning with its very first section 271 order, that it has the sole responsibility of determining whether a BOC has both met the requirements of subsection (c)(1) and “has fully implemented the competitive checklist,” 47 U.S.C. § 271(d)(3)(A)(i), and that state commissions have only a consultative role in that process. See Oklahoma Order ¶ 15 (“we find that the Oklahoma Commission’s determination on this issue is not dispositive. Section 271 requires us to consult with the Oklahoma Commission ‘in order to verify the compliance of [SBC] with the requirements of [section 271(c)]’ before we make any determination on SBC’s application under section 271(d). At the same time, as the expert agency charged with implementing section 271, we are required to make an independent determination of the meaning of statutory terms in section 271.”) (footnote omitted).

Less than two months later, this Commission recognized that it

has discretion in each section 271 proceeding to determine what deference the Commission should accord to the state commission’s verification in light of the nature and extent of state proceedings to develop a complete record concerning the applicant’s compliance with section 271 and the status of local competition. We will consider carefully state determinations of fact that are supported by a detailed and extensive record, and believe the development of such a record to be of great importance to our review of section 271 applications. We emphasize, however, that it is our role to determine whether the factual record supports a conclusion that particular requirements of section 271 have been met.

Michigan Order ¶ 30 (emphasis added); see also First Louisiana Order ¶ 9; South Carolina Order ¶ 29. Indeed, the D.C. Circuit has held that “[a]lthough the Commission must consult with the state commissions, the statute does not require the FCC to give the State commissions’ views any particular weight.” SBC Communications Inc. v. FCC, 138 F.3d 410, 416 (D.C. Cir. 1998).

contained in XO’s current interconnection agreement. We expect it to be submitted to the California PUC today.

As Pacific explained in its opening brief (at 76) and in its reply brief (at 64), Pacific's performance on local number portability measures had been excellent in the months leading up to the CPUC's Final Decision. See also Johnson Aff. 175-177 (App. A, Tab 12); E. Smith Reply Aff. ¶¶ 7-9 (Reply App., Tab 15). The California PUC completely ignored evidence of this performance.³ Simply put, the California PUC, relying on evidence that was both ancient and anecdotal, was wrong when it concluded that a mechanized NPAC verification check was necessary to ensure Pacific's compliance with checklist item 11. As the Department of Justice recognized, the Commission "has not previously required a mechanized process to be in place for checklist compliance," DOJ Evaluation at 4 n.13, Virginia Arbitration Award ¶¶ 563-566, CC Docket Nos. 00-218, 00-249 and 00-251 (WB July 17, 2002), and Pacific's recent and exemplary performance on the relevant LNP measures makes it unnecessary to impose any such requirement in this proceeding.

So, just as with the interim DS3 rate discussed above, Pacific relies on the record that it submitted on September 20, 2002. The fact that Pacific subsequently implemented the mechanized NPAC verification check should reassure the Commission that Pacific has now met even the heightened standard imposed by the California PUC, but it is not necessary to rely on the mechanized NPAC verification check to find that Pacific is in full compliance with checklist item 11.

Please let us know if you have any further questions

Sincerely,

A handwritten signature in black ink, appearing to read "James C. Smith", written in a cursive style.

James C. Smith

³ "Because it is the Commission's statutory duty to determine whether the requirements of section 271 have been satisfied, the Commission is not limited to considering only the issues and Facts that were presented in the state commission proceeding. We find no basis in the statute to justify our refusal to consider all information that is pertinent to our evaluation of an application." South Carolina Order ¶ 27.